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No. 83-1834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARY ANNE ROBERTSON,
Petitioner,

v.

FLORIDA BOARD OF BAR EXAMINERS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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BRIEF FOR RESPONDENT IN OPPOSITION

C. GRAHAM CAROTHERS
227 South Calhoun Street
Tallahassee, Florida 32302
904/224-9115
(Counsel of Record)

STEPHEN C. EMMANUEL
227 South Calhoun Street
Tallahassee, Florida 32302
904/224-9115
Attorneys for Respondent

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QUESTION PRESENTED

May the Florida Board of Bar Examiners require applicants for admission to the Florida Bar to disclose "regular treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder."

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BRIEF FOR RESPONDENT IN OPPOSITION

RULES INVOLVED

Article I, Section 1 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar provides, in pertinent part:

> The admission of attorneys to the practice of the profession of law is a judicial function.

Article I, section 3 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar provides, in pertinent part:

> a. Qualifications. Attorney members shall be practicing attorneys with scholarly attainments and

an affirmative interest in legal education and requirements for admission to the Bar. Lay members shall have an academic Bachelor's Degree. It is desirable that lay members possess educational or work-related experience of value to the Board such as educational testing, accounting, statistical analysis, medical or psychologically related sciences.

d. Essential Conduct. A bar examiner should be conscientious, studious, thorough and diligent in learning the methods, problems and progress of legal education, in preparing bar examinations, and in seeking to improve the examination, its administration and requirements for admission to the Bar. Each examiner should be just and impartial in recommending the admission of applicants and should exhibit courage, judgment and moral stamina in refusing to recommend applicants who lack adequate general and professional preparation or who lack good moral character.

Article I, Section 14 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar provides, in pertinent part:

> All information maintained by the Board in the discharge of those responsibilities delegated to it by the Supreme Court of Florida shall be confidential except as provided by these Rules or otherwise authorized by the Court. All matters including, but not limited to, registrant and applicant files, investigative reports, examination material, and inter-office memoranda shall be the property of the Supreme Court of Florida and the Board shall serve as the custodian of all such records.

Article II, Section 1 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar provides:

> Every person intending to apply for admission to The Florida Bar shall, within one hundred fifty (150) days following the commencement of the study of law in an accredited law school, register with the

> Board by filing an Applicant's Questionnaire and Affidavit (Form 1) as a registrant upon the forms supplied by the Board, including the documents and papers specified in Article IV, Section 4 except for the filing of the Certificate of Dean as specified in Article IV, Section 4b.(1); a fee of $50.00 as specified in the provision of Article V, Section 5; and such other papers as may from time to time be reasonably required by the Board. The Board will consider as timely filed any registration postmarked or received one hundred fifty (150) days following the commencement of the study of law.

Article III, Section 3(a) of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar provides, in pertinent part:

> Prior to recommending an applicant for admission to practice the profession of law in Florida, the Florida Board of Bar Examiners shall conduct an investigation and otherwise inquire into and determine the character, fitness, and general qualifications of every applicant.

STATEMENT OF THE CASE

The Florida Board of Bar Examiners (hereinafter the "Board") accepts the Petitioner's Statement of the Case and would add the following material facts:

The admission of attorneys to the practice of law in Florida is a judicial function belonging exclusively to the Florida Supreme Court.[1] The Board is charged by the Supreme Court with the authority and responsibility of determining the character and fitness of applicants to the Florida Bar.[2] By this delegation, the Board has been appointed the fact-finder to determine whether an applicant

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[1] Art. V, § 15, Fla. Const. (*See* Petition at page 3); Fla. Sup. Ct. Bar Admiss. Rule, art. I, § 1.

[2] Fla. Sup. Ct. Bar Admiss. Rule, art. III, § 3(a).

to the Bar possesses the requisite education, character, and fitness for the practice of law.

In order to expedite its investigations and insure timely admissions, the Board requests every law student seeking admission to the Florida Bar to complete an Applicant's Questionnaire and Affidavit within one hundred fifty (150) days following commencement of the study of law in an accredited law school.[3] Among the areas of inquiry are previous employment, criminal arrests and convictions, educational background and credit status. If information is revealed which suggests the need for further inquiry, the Board, through its staff, conducts an appropriate investigation.

In order to thoroughly conduct its investigation and properly make its determination, the Board *necessarily* asks questions which are of a personal nature and which would perhaps not be asked of persons not applying for a position of such trust and responsibility. Among the personal matters into which inquiry is made is the past history of regular treatment (currently defined as more than four consultations within a twelve month period) for emotional disturbance or nervous or mental disorder requested in Item 28(b) of the Applicant's Questionnaire and Affidavit.

Petitioner Mary Anne Robertson entered law school in August, 1978, and in accordance with Article II of the Florida Supreme Court Rules Relating to Admissions submitted her Applicant's Questionnaire and Affidavit which was received by the Board on January 16, 1979. Initially, Petitioner responded to all the questions in the Questionnaire save one, Item 28(b). After receiving Petitioner's Questionnaire, the Board advised Petitioner the processing of her application could not begin until her Questionnaire was completed. (App. to Petition at page 21). The Board assured Petitioner, however, that all responses to the Questionnaire "are kept strictly confi-

[3] Fla. Sup. Ct. Bar Admiss. Rule, art. II, § 1.

dential and are viewed only by those connected with the admission process in Florida." *Id.*

Rather than respond to Item 28(b), Petitioner petitioned the Florida Supreme Court on April 27, 1981, for a review of the Board's decision to withhold processing of her application.[4] Subsequently, as Petitioner herself admits, Petitioner filed an Amendment to her application responding to Item 28(b) which was received on June 1, 1981, several weeks prior to her graduation from law school in July, 1981. Petitioner's application was then processed and she was admitted to the Florida Bar on November 20, 1981.

On November 10, 1983, the Florida Supreme Court denied Petitioner's petition for review, citing its November 3, 1983 decision in *Florida Board of Bar Examiners Re: Applicant*, 443 So.2d 71 (Fla. 1983). In *Board of Bar Examiners I*, the Supreme Court of Florida expressly rejected both the statutory and constitutional claims being advanced by Petitioner. In particular, while not expressly deciding whether or which federal privacy rights may be implicated by Item 28(b),[5] the Florida Supreme Court

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[4] In her brief to the Florida Supreme Court, Petitioner objected to Item 28(b) on the grounds it violated Florida's psychotherapist-patient privilege, Section 90.503, Florida Statutes, and her Florida and federal privacy rights.

[5] In *Board of Bar Examiners I*, the Florida Supreme Court found it unnecessary to decide which federal constitutional privacy rights were implicated by Item 28(b) because the Florida court found Item 28(b) constitutional under this Court's highest standard of review, the compelling state interest test, while examining the applicant's rights under Article I, Section 23 of the Florida Constitution. 443 So.2d at 76. However, the Florida Supreme Court expressly noted that if it were to find an applicant's decision-making or autonomy zone of privacy rights affected by Item 28(b), the decisions of this Court would require it to apply the compelling state interest test. *Id.* Additionally, the Florida Supreme Court further noted that if it were to find Item 28(b) affected the privacy rights described by this Court in *Whalen v. Roe*, 429 U.S. 589 (1976), and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), it should employ a balancing test. *Id.*

found the Board to have demonstrated "a compelling state interest and use of the least intrusive means" sufficient to uphold Item 28(b) under the highest standard of review. 443 So.2d at 76. On February 9, 1984, the Florida Supreme Court denied Petitioner's petition for rehearing and Petitioner sought a Writ of Ceriorari from this Court on May 9, 1984.

SUMMARY OF ARGUMENT

In her Petition, Petitioner seeks review of a Florida Supreme Court decision holding Item 28(b) does not violate a bar applicant's right to privacy. However, since initiating her suit, Petitioner has voluntarily completed Item 28(b) and has been admitted to the Florida Bar. Having brought suit individually and not on behalf of a class, Petitioner's admission to the Florida Bar has rendered her case moot.

Moreover, even if this Court were to decide this case is not moot, the Petition for a Writ of Certiorari should be denied because the Florida Supreme Court has not decided an important question of federal law which has not been settled by this Court, nor has it decided a federal question in a way that conflicts with the applicable decisions of this Court.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S VOLUNTARY RESPONSE TO ITEM 28(b) AND SUBSEQUENT ADMISSION TO THE FLORIDA BAR RENDERS THIS CASE MOOT.

In her Petition for a Writ of Certiorari, Petitioner states that in May, 1981, she filed an Amendment to her Application answering Item 28(b).[6] Six months

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[6] In her Petition for a Writ of Certiorari, Petitioner states she responded to Item 28(b) on May 29, 1981. However, Petitioner's Amendment to her application answering Item 28(b) is dated May 20, 1981, and was received by the Board on June 1, 1981.

later, the Board completed its investigation of Petitioner and she was admitted to the Bar.[7] Petitioner's voluntary amendment of her application and subsequent admission to the Florida Bar has clearly mooted her constitutional claims.

This Court has repeatedly stated that federal court jurisdiction " 'depends upon the existence of a case or controversy' " and that " 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.' " *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974), quoting *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964), and *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). This requirement of an actual controversy must be fulfilled at all times, not simply on the date of the action is commenced. *Roe v. Wade*, 410 U.S. 113, 125 (1973). In the instant case, there remains no live controversy between Petitioner and Respondent: Petitioner has completed the application process and has been admitted to the Florida Bar. Moreover, having been admitted to the Bar, there is little likelihood she will ever be required to repeat the application process.[8]

In this regard, the fact of this case resemble those in *DeFunis v. Odegaard*, 416 U.S. 312 (1974). In *DeFunis*, a plaintiff who challenged the admission policies of the University of Washington Law School was allowed to attend law school pending his appeal. When this Court heard argument on the case, DeFunis had entered his final quarter and was assured of graduating regardless of the Court's ruling. As the Court's ruling would have

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[7] Petitioner was admitted to the Florida Bar on November 20, 1981. As noted by Petitioner, the Board normally requires six to eight months to conclude its character investigation. Petitioner's Petition for a Writ of Certiorari at 11.

[8] Petitioner could only be called upon to repeat the application process were she to be disbarred and subsequently seek readmission to the Florida Bar.

no effect upon DeFunis, the case was dismissed as moot. Similarly, the ruling sought by Petitioner today can have no effect upon her as she has completed the application process and has been admitted to the Florida Bar.

Moreover, it cannot be argued this case presents a question that is "capable of repetition, yet evading review," *Roe v. Wade*, 410 U.S. 113, 125 (1973), and is thus amenable to adjudication by this Court. In order for this case to be reviewable under that doctrine, there must be a reasonable expectation the Petitioner herself will be subject to the disputed action again. *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974) ("But DeFunis will never again be required to run the gantlet of the Law School's admission process, and so the question is certainly not 'capable of repetition' as far as he is concerned."); *Gomes v. Rhode Island Interscholastic League*, 604 F.2d 733 (1st Cir. 1979) ("But our focus must be one whether the question will recur not as to other high school students but as to Gomes, a high school senior, who sued only on behalf of himself and not as a class representative.") As Petitioner will never again be required to answer Item 28(b), this condition is clearly not satisfied in this case. *Nestler v. Board of Law Examiners of State of N.C.*, 611 F.2d 1380, 1382 (4th Cir. 1980) (plaintiffs' admission to bar mooted challenge to state admission's policies "since plaintiffs will never again be required to take the North Carolina bar examination or the moral character interview").

Petitioner brought this action individually and not on behalf of a class. As she retains no interest in the issue she seeks to bring before the Court, this Court should reject Petitioner's request for certiorari on the grounds the case is moot. *Indianapolis School Comm'rs v. Jacobs*, 420 U.S. 128 (1975); *Sosna v. Iowa*, 419 U.S. 393, 399-401 (1975).

II. THE FLORIDA SUPREME COURT HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT, NOR HAS IT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Only one federal issue has been raised by Petitioner—whether Item 28(b) violates a bar applicant's constitutional right of privacy. Because that issue presents an insubstantial federal question, Petitioner's request for a Writ of Certiorari should be denied. Rule 17.1(c), Rules of the U.S. Supreme Court. Alternatively, because the decision of the Florida Supreme Court is in harmony with the applicable decisions of this Court, the Petition for a Writ of Certiorari should be denied. *Id.*

Petitioner alleges Item 28(b) violates her right to privacy as guaranteed by the U.S. Constitution. Petitioner argues this Court has recognized three different strands of the constitutional right to privacy, all of which are implicated by Item 28(b). In fact, none of the cases cited by Petitioner support her constitutional claim.

Citing *Katz v. United States*, 389 U.S. 347 (1967), and *Olmstead v. United States*, 277 U.S. 438 (1928), Petitioner first argues Item 28(b) violates her right "to be free in her private affairs from governmental surveillance and intrusion." Petitioner's Petition for a Writ of Certiorari at 19. However, both *Katz* and *Olmstead* dealt with the Fourth Amendment's prohibition against unreasonable search and seizure. Any contention what the information called for in Item 28(b) constitutes an unreasonable "search" can only be described as frivolous.

Second, Petitioner argues Item 28(b) impinges on her disclosural privacy right. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *Whalen v. Roe*, 429 U.S. 589 (1977). However, both *Whalen* and *Nixon* upheld the required disclosures. In *Whalen*, the Court ruled

the right of an individual to control access to his or her medical history must yield to the State's interest where public health or other public concerns necessitate disclosure. *Whalen* at 602. Likewise, in *Nixon* the Court found Mr. Nixon's right to privacy outweighed by the public's interest in the archival papers. *Nixon* at 465.

Similarly, the public's interest in the mental and emotional fitness of those persons seeking admission to the practice of law clearly outweighs any privacy rights of the Petitioner. This Court has repeatedly held "a State has a constitutionally permissible and substantial interest in determining whether an applicant possesses 'the character and general fitness requisite for an attorney and counselor-at-law.'" *In re Griffiths*, 413 U.S. 717, 722-23 (1973), quoting *Law Students Research Council v. Wadmond*, 401 U.S. 154, 159 (1971).

The limited disclosure[9] called for in Item 28(b) is certainly no greater than that under consideration in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (record-keeping requirements for abortions), in *Whalen* (record-keeping requirements for controlled substances), and in *Nixon* ("extremely private communications between him [Nixon] and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends as well as personal diary dictabelts and his wife's personal files." 433 U.S. at 459.).

Indeed, Petitioner's privacy claim more closely resembles that raised in *Law Students Research Council v.*

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[9] Petitioner unconvincingly argues Item 28(b) requires an applicant to disclose facts without sufficient guarantees the information will remain confidential. However, Article I, Section 14 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar expressly provides guidelines insuring the confidentiality of all information maintained by the Board. Additionally, Article I, Sections 3a and d of the same Rules further establishes high standards for the qualifications and conduct of Board members.

Wadmond, 401 U.S. 154 (1971). In *Wadmond*, the appellants contended certain character and fitness requirements for admission to the New York Bar violated an applicant's right to privacy. However, this Court rejected this claim outright, stating it bordered "on the frivolous." 401 U.S. at 160.

Finally, Petitioner asserts Item 28(b) impinges on her right to decisional autonomy. However, this branch of the right to privacy has been strictly limited to matters relating to marriage, *Loving v. Virginia*, 388 U.S. at (1967), procreation, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), contraceptives, *Eisenstad v. Baird*, 405 U.S. 438 (1972), family realtionships, *Prince v. Massachusetts*, 321 U.S. 158 (1944), and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). As in *Paul v. Davis*, 424 U.S. 693, 713 (1976), Petitioner's claim "is far afield from this line of decisions."

Nonetheless, Petitioner argues the required disclosure is constitutionally infirm because it may result in a potential applicant either choosing to forego needed counseling because of the disclosure requirement or choosing to forego the practice of law in Florida rather than disclose past consultations. In *Whalen v. Roe*, 429 U.S. 589 (1977), the appellees similarly argued a New York statute which required the disclosure of the use of certain drugs violated their right of privacy because the disclosure might make some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use was medically required. *Id.* at 600. While acknowledging the New York statute may have such an effect, this Court nonetheless upheld the statute over the privacy objections. *Id.* at 602-04.

As is seen above, there is no support for any of the privacy arguments made by Petitioner. Moreover, in *Board of Bar Examiners I* the Florida Supreme Court acknowledged and properly applied the applicable right to privacy decisions of this Court. Accordingly, the Petition

for a Writ of Certiorari should be denied because the Florida Supreme Court has not decided an important question of federal law which has not been settled by this Court. Rule 17.1(c). Alternatively, the Petition for a Writ of Certiorari should be denied because the Florida Supreme Court has not decided a federal question in a way that conflicts with the applicable decisions of this Court. *Id.*

CONCLUSION

Petitioner's admission to the Florida Bar has clearly mooted her constitutional claims. Moreover, the Florida Supreme Court's finding that the Board demonstrated a compelling state interest and the use of the least intrusive means is in accordance with the applicable decisions of this Court. Accordingly, the Petition for a Writ of Certiorari to the Florida Supreme Court should be denied.

Respectfully submitted,

C. GRAHAM CAROTHERS
227 South Calhoun Street
Tallahassee, Florida 32302
904/224-9115
(Counsel of Record)

STEPHEN C. EMMANUEL
227 South Calhoun Street
Tallahassee, Florida 32302
904/224-9115

Attorneys for Respondent